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Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on October 1, 1956.

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (App. 19-35) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956. Petition for rehearing was denied on November 20, 1956. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS INVOLVED

1. Where, because of the ruling of the District Court, there is no occasion in the trial of a case for a plaintiff to introduce evidence of material facts in conflict with those produced by defendant on the issue of an affirmative defense, does a Court of Appeals, in reversing a judgment for plaintiff on such issue, have the power also to direct entry of judgment for defendant?

2. Does a Court of Appeals, in reversing the ruling of a District Court dismissing an affirmative defense, have the power also of directing entry of judgment for defendant on the issue of such defense instead of merely ordering a new trial, where the evidence pertaining to this issue is subject to conflicting inferences and conclusions which may be drawn by reasonably minded men?

3. May a Court of Appeals reverse the action of a Trial Judge dismissing an affirmative defense where the evidence adduced by defendant in support of such defense is legally insufficient to warrant the submission of the issue of such defense to the jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law".

28 U. S. C. 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, Workmen's Compensation, Code of Laws of South Carolina, 1952.

"Sec. 72-111. **Liability of owner to workmen of sub-contractor.**

When any person * * * referred to as "owner", undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (* * * referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had immediately been employed by him."

"Sec. 72-121. **Employee's rights under Title exclude all others against employer.**

The rights and remedies granted by this Title to an employee when he and his employer have accepted

the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee * * * as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-101. **When acceptance of provisions presumed.**

Every employer and employee * * * shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby * * *."

STATEMENT OF CASE

Petitioner, a resident of North Carolina, brought suit against respondent, Blue Ridge Rural Electric Cooperative, Inc., a South Carolina Corporation engaged in the business of supplying and distributing electric power, to recover damages for negligence in causing and permitting electric current to run into a structure—a substation—in the process of construction on which petitioner was working as an employee of an independent contracting construction firm under contract by respondent to construct a large project, including the substation involved herein, at a cost of $334,000.00 to be used by respondent upon completion, and resulting in the loss of both forearms of petitioner who at the time of his injuries was twenty-four years of age, married, the father of two children, and had an earning capacity of approximately $5,000.00 per year.

Approximately two weeks before trial, respondent was permitted by the District Court to file an amended answer which plead as an affirmative defense that the work of constructing the substation performed by petitioner at the time of his injury was the trade, business and occupation of respondent and therefore the South Carolina Workmen's

Compensation Act, Sections 72-111 and 72-121, was petitioner's exclusive remedy and operated as a bar to the instant suit.

At the trial of the case respondent in support of its alleged defense that it was engaged in the business of constructing substations produced as a witness its manager, A. J. Hurt, who testified that respondent had built with its own employees and facilities three of its six substations, the last of which was built at Liberty, South Carolina, three years previous to petitioner's injuries. On re-cross examination, however, the witness Hurt admitted that respondent, not only did not build with its own facilities and employees the substation at Liberty, South Carolina, but also that it did not build with its own facilities and employees any of its six substations. His testimony was also equivocal and evasive.

At the conclusion of respondent's case and before petitioner's case in reply, petitioner tested the legal sufficiency of respondent's evidence as to the issue of the affirmative defense by moving to dismiss this defense. The District Judge granted the motion and thereupon requested whether petitioner had any reply testimony, to which he responded that he had none.

After petitioner had rested with the response that he had no reply testimony, respondent moved for a directed verdict on the ground, *inter alia*, that the work of constructing the substation performed by petitioner at the time of his injury was part of the business, trade or occupation of respondent. This motion was denied and the case was submitted to the jury on the sole issues of negligence and contributory negligence.

The jury brought in a verdict of $126,786.80 in favor of petitioner upon which judgment was entered. Motion by

respondent for judgment *n. o. v.* or for new trial was denied.

Upon appeal, the Court of Appeals reached a factual finding, from its own view of the testimony, that respondent built three substations with its own facilities which the Court held conclusively supported respondent's theory and defense that respondent was not only in the business of supplying and distributing electricity, but also in the business of constructing substations. The Court therefore reversed the District Court's judgment.

The Court of Appeals did not stop there, however. It concluded that the testimony on this issue was uncontradicted, judged it as credible, and remanded the case with direction to enter judgment for respondent. Yet nowhere in its otherwise detailed opinion was there any discussion of the propriety of this direction. Petition for rehearing was filed requesting, at the least, that the judgment be modified to direct a new trial (App. 35-45) but was denied by the Court below on November 20, 1956. (App. 46.)

REASONS FOR GRANTING THE WRIT

1. **The decision herein is not in accord with applicable decisions of this Court:** The issues in this case are (1) whether a Court of Appeals has the power to deny a party the opportunity of presenting testimony which he had no occasion to present at the trial because of the ruling of the District Judge, by directing entry of judgment for the opposite party upon reversing the ruling of the District Judge; (2) whether a Court of Appeals has the power to weigh conflicting inferences and judge the credibility of witnesses; and (3) whether a Court of Appeals may reverse the action of a District Judge dismissing an affirmative defense where the evidence of defendant is legally insufficient to sustain its burden of proof.

On the first issue the decision of the Court below is in conflict with the holding of this Court that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits, by directing judgment against him, where such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Court declared erroneous by the Court of Appeals.

Weade v. Dickmann, Wright & Pugh, 337 U. S. 801;
Fountain v. Wilson, 336 U. S. 681;
Kaku Nagano v. McGrath, 342 U. S. 916.

In each case the question before this Court was whether the appellate court could order judgment for a successful appellant on an issue as to which the opposite party had no occasion in the trial court to produce evidence or controvert the material facts of the successful appellant.

The rationale of the foregoing cases applies with equal force to the instant case which presents the same important general problem. Petitioner's motion to dismiss the affirmative defense before his reply case was based upon the particular legal theory that the evidence of respondent in support of its affirmative defense was legally insufficient to support a verdict for respondent on this defense and consequently did not warrant the presentation of any reply testimony by petitioner on the issue of such defense. This motion was granted, and, therefore, not only was there a lack of occasion to controvert respondent's testimony on this issue, but any further testimony on this point would have been superfluous and would have transgressed the ruling of the District Judge. The action of the District Judge in disposing of this issue at the first opportunity which in his opinion was appropriate and in accord with

the rights of the parties was in consonance with the spirit of our federal procedural law as expressed in Rule 1 of the Federal Rules of Civil Procedure that there shall be a "just, speedy and inexpensive determination of every action."

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of his opponent's case in the trial court. It would thus tend to discourage, contrary to the spirit of the Federal Rules of Civil Procedure, mid trial attacks on the legal sufficiency of an opponent's case and consequently add to the time and expense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the Constitution which was not framed nor adopted to deprive a party of either the right to a jury trial or of the right to challenge the legal sufficiency of the opponent's case. "The Amendment is impartial in the guaranty of both." *Galloway v. U. S.*, 319 U. S. 372, 393.

Also the decision of the Court below directing entry of judgment for defendant is not an "appropriate" judgment which was "just" under the circumstances, and therefore not authorized by 28 U. S. C. 2106. *Bryan v. U. S.*, 338 U. S. 552.

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review.

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution:** The Court below, in reversing, undertook to direct the entry of judgment for

the respondent under the assumption that (1) the testimony of respondent's manager, A. J. Hurt, that respondent built with its own facilities three of its six substations was uncontradicted, (2) Hurt's testimony was credible and therefore conclusive and (3) the only inference or conclusion deducible from such testimony was that respondent was engaged in the business of constructing substations. Petitioner challenges both the power and assumption of the Court below. He submits that the witness Hurt's testimony, although not contradicted by adverse testimony, was self contradictory. He also submits that by reason of such self contradictions, evasiveness of the witness, his interest in the case and his manner of testifying, the credibility of the witness was clearly put in issue, which is for a jury to determine. Petitioner also submits that even if the credibility of the witness Hurt were not an issue, and even if the record can be viewed as if there were testimony in the case that respondent constructed three substations with its own facilities, the last of which was constructed three years before petitioner's injuries, despite the subsequent change of Hurt's testimony concerning these facts, the conclusion is clear that respondent had abandoned such work for a period of three years prior to petitioner's injury and was not engaged in the business of constructing substations at the time of the injuries. At the least, these circumstances presented for the determination of a jury the factual question of whether respondent was engaged in the business of constructing substations so as to invoke the basic defense of the South Carolina Workmen's Compensation Act.

That it would be an undue invasion of the jurys' historic function for an appellate court to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence is an established rule of judicial review.

Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

It is also well settled that testimony of a witness, even if not contradicted by adverse testimony of other witnesses, raises an issue of credibiliy which is for a jury to determine where the witness has an interest in the outcome of the case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 621, his testimony is self-contradictory, evasive, equivocal, clouded with uncertainties and generalities, or his manner of testifying gives rise to doubts of his sincerity, *Quock Ting v. U. S.* 140 U. S. 417, 20 Am. Jur. page 1030, Section 1180 *et seq.*

The Court below, in directing entry of judgment for respondent, contrary to established principles of law and invading the province of the jury, judged the credibility of the material witness A. J. Hurt and viewed the case in the light most favorable to the respondent; it relied upon the testimony of Mr. Hurt that respondent used its own facilities and employees to construct three of its substations, despite his subsequent change of testimony, as conclusive that the respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to petitioner's action herein.

Viewing the testimony of Mr. Hurt as a whole, as it must be viewed on appeal, and not out of context as viewed by the Court below, it becomes clear that his credibility became an issue determinable by a jury; and, even assuming that after Mr. Hurt completed his recross examination there was evidence remaining in the record that respondent had used its own facilities to construct substations, it

is clear from the record that respondent at the time of petitioner's injury not only had abandoned such work but also that the evidence was subject to conflicting inferences and conclusions on the question of whether respondent was engaged in the business of constructing substations.

The evidence of record shows (1) that respondent had six substations, (2) that on direct and cross examination respondent company's manager, A. J. Hurt, testified that three of the substations were constructed with respondent's own facilities and employees, the last of which was constructed at Liberty, South Carolina, three years prior to petitioner's injuries; (3) that on being recalled to the stand for recross examination the following day, Mr. Hurt stated that respondent did not use its own facilities and employees to construct its substation at Liberty, South Carolina, three years prior to petitioner's injuries, but that the work was done by an independent contracting construction firm engaged in the business of constructing substations; (4) that Mr. Hurt finally testified on recross examination that respondent did not use its facilities or employees to build any of its six substations; (5) that Mr. Hurt's testimony was evasive as to the number of substations respondent operated; (6) that he refused to answer a material question propounded by petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might subject the witness to contempt of court; and (7) that Mr. Hurt's testimony on depositions taken before trial was in direct conflict with the knowledge he professed to have about material facts to which he testified at the trial. Under the foregoing evidence, even if it can be held that the action of the District Judge dismissing the affirmative defense was erroneous, the credibility of the witness Hurt, the weight of his testimony and the conflicting inferences and

conclusions that may be drawn from the evidence, are all questions which should be determined by a jury.

Therefore, it is respectfully submitted that the Court below, by substituting its view of the case for that which should be determinable by a jury, has invaded the province of the jury, contrary to the rights of petitioner under the 7th Amendment to the Constitution of the United States.

3. **The action of the Court below, in reversing the ruling of the District Judge dismissing the affirmative defense, is inconsistent with applicable federal procedure and contrary to the applicable state law:** The action of the Court below in reversing the ruling of the District Judge dismissing the affirmative defense is in direct conflict with the holding of this Court that where a party having the affirmative of an issue has the occasion and the opportunity to produce evidence on such issue but the evidence produced thereon is legally insufficient to support the burden of the party's proof, such issue should be withdrawn from the consideration of the jury.

Galloway v. United States, 319 U. S. 372.

In the instant case, although Mr. Hurt testified on direct and cross examination that respondent used its own facilities to construct three substations, the record shows that on recross examination he flatly changed his testimony and stated that respondent did not construct with its own facilities and employees any of the substations. This left the record with no evidence upon which a finding could be made that respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a defense. The District Judge so considered it and thus it became his duty, in accordance with applicable federal law, to withdraw this issue from the jury.

Moreover, the pleadings, respondent's answers to interrogatories and the evidence of record show conclusively that the substation under construction on which petitioner lost both his forearms was neither owned, controlled nor possessed by respondent at the time of petitioner's injuries and that respondent had no interest or concern in the work performed by petitioner on the substation during the course of its construction. Under applicable South Carolina law, *Miles v. W. Va. Pulp and Paper Co.*, 212 S. C. 424, in order to render an "owner" liable for the payment of Workmen's Compensation to an injured employee of an independent contractor it is a necessary requisite that the subject-matter of the work performed by the employee at the time of his injury be **owned** by the "owner." The South Carolina Supreme Court made it clear in the cited case that in other South Carolina cases where employees of subcontractors were held to come within the Act as against the person (owner) engaging the subcontractor, the subject-matter of the work performed by each employee was **owned** by the "owner," and the Court was also careful to point out this distinguishing feature in rejecting the application of the Act to the facts in the cited case, as follows:

> "In all three cases just cited, the timber cut and transported to the employer's manufacturing plants **was the property of the employer,** which is in significant contrast to the facts in this case. Here there was **no ownership** by the defendant of the timber or the harvested pulpwood prior to the delivery of the latter to the railroad company for transportation to the defendant" (Emphasis added.)

So, likewise, as appears from the opinion of the Court below in the instant case, "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days."

The Court below held that the South Carolina cases of *Marchbanks v. Duke Power Company*, 190 S. C. 336, and *Boseman v. Pacific Mills*, 193 S. C. 479, were controlling. In each of the cited cases it will be noted that (1) the employee performed **maintenance** work required to be performed periodically and recurrently in order to carry on and continue the business of the owner, no matter how large, small, static or progressive such business might be, and (2) that such work was performed on a facility **owned** by the defendant. Such facts are in significant contrast to the facts herein that petitioner at the time of the injury was performing the non-periodic and non-recurrent work of constructing a new facility to be turned over to the respondent upon completion and that the subject-matter of the work was not owned by the respondent at the time of petitioner's injuries. Compare *Tucker v. Texas Oil Co.* (C. A. 5), 203 F. (2d) 918.

The ruling of the Chief Judge of the District Court for the Western District of South Carolina, Honorable C. C. Wyche, involved a question of local substantive law of South Carolina. His ruling was in accord with correct principles of law and in consonance with the philosophy announced in the decisions of the South Carolina Supreme Court and enunciated by the Court of Appeals for the Fourth Circuit in a prior case, *Sears Roebuck v. Wallace*, 172 F. (2d) 802, a case on which Judge Wyche sat as a member of the Court of Appeals. No reason was stated in the opinion of the Court below for not applying the controlling principles of the *Sears case* in which it was held that the work of making alterations by an independent contractor in a storage warehouse of the owner was not the business of the owner, except the brief passing remark that the *Sears case* was distinguishable from the instant case "on the ground that the work done, although useful to

the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged." It is clear, however, from a reading of both decisions and the record herein that the facts in the instant case are much stronger than those in the *Sears case* to warrant the exclusion of the Workmen's Compensation Act as a defense and that the decision of the Court below in the case at bar is in direct conflict and irreconcilable with the *Sears case*, both on the law and the facts.

The Court below, not having among its members a South Carolina lawyer, in reversing the action of the Chief District Judge, contrary to the accepted and usual course of judicial review, did not give due weight to the judgment of the District Judge on a question of local law of a state in which the District Judge was an outstanding and able lawyer of long experience who had served in the South Carolina legislature and had sat as an acting Associate Justice of the State Supreme Court. *Bernhardt v. Polygraphic Company of America*, 350 U. S. 198; *Standard Brands v. Bateman*, 184 F. (2d) 1002 (C. A. 8) cert. den. 340 U. S. 942. Appellate courts should be slow to impute to trial courts a want of perspicacity in determining the local law, and, as stated in headnote I *Nordin v. May*, 208 F. (2d) 131, (C. A. 8), "where question to be determined involved application of state law, which, at best, was at least uncertain on the subject, Court of Appeals on appeal would defer to judgment of Federal District Court concerning the state law."

The unreported decision of another District Judge of South Carolina, *Ballard, Adm'x. v. Southern Oil Co.*,[1] in-

[1] *Ballard, Adm'x. v. Southern Oil Co.*, Civil Action No. 5198, E. D. S. C., was decided by the Chief Judge of the District Court for Eastern District of South Carolina, who also was an outstanding lawyer of long experience in South Carolina. His opinion, which is included as part of the record for the use of this court, is set forth in full in Appendix to Appellee's brief in court below.

volving a different theory in the application of state law to a case factually similar to the present case also supports the result of the instant case in the District Court. The Court below, however, likewise, rejected the judgment of the other local District Judge in the application of state law.

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a Writ of Certiorari, should reverse the judgment of the Court below, and should affirm the judgment of the District Court or order the Court of Appeals to remand the case for a new trial.

Respectfully submitted,

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APPENDIX

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DECISION OF COURT OF APPEALS

(Argued June 7, 1956. Decided October 1, 1956.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and MOORE, District Judge.

Ray R. Williams, and Wesley M. Walker (Leatherwood, Walker, Todd & Mann, and Williams & Henry on brief) for Appellant, and Henry Hammer (Henry H. Edens and William E. Chandler, Jr., on brief) for Appellee.

SOPER, Circuit Judge:

James Earl Byrd, an electric lineman in the employ of R. H. Bouligny, Inc., a construction company, lost both forearms on February 17, 1953, when he accidentally came in contact with a live wire while working on a construction project of Blue Ridge Rural Electric Cooperative, Inc., which was engaged in the distribution of electricity in rural areas. Byrd filed a claim against his employer under the Workmen's Compensation Act of South Carolina and collected full benefits. He then brought the present suit against the Cooperative claiming that the accident was due, at least in part, to its negligence. Blue Ridge defended on the grounds (1) that the accident was not due to its negligence but to the negligence of Bouligny and the contributory negligence of Byrd, and (2) that even if Blue Ridge were negligent, Byrd's only remedy was afforded by the Compensation Act since the work being done by the contractor was part of the business of the Cooperative. The District Judge rejected the contention that the liability of the Cooperative was confined to the payment of compensation and submitted the negligence questions to the jury, which found a verdict for the plaintiff in the sum of $126,786.80, and the defendant appealed.

Blue Ridge Rural Electric Cooperative was organized as a rural electric cooperative in 1939 under the provisions of the Rural Electric Cooperative Act of South Carolina, Chapter 15 of the South Carolina Code of 1952. Section 12-1021 of this statute authorizes the organization of cooperative nonprofit membership corporations for the purpose of supplying electric energy and extending its use in

rural areas; and §12-1025 empowers a cooperative to generate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment, and any and all kinds of property which may be necessary or convenient to accomplish the purposes for which the corporation is organized.

Acting under this statute, Blue Ridge has engaged in supplying electricity to the rural people of four counties in South Carolina, and in the construction and maintenance of distribution lines, transmission lines and substations. The system was begun by the State Rural Electrification Authority, and comprised 300 miles of line serving 1,100 consumers when it was taken over by Blue Ridge in 1939. Since then it has steadily grown until at the time of the trial in the District Court in 1955, it had 2,000 miles of line and 10,816 consumers or members.

On June 23, 1952, Blue Ridge let a contract to Bouligny in order to expedite its construction work. It had secured a government loan under a loan agreement approved by the Rural Electrification Administration, acting by the Administrator, and the construction contract was executed in conformity with the provisions of the loan agreement. The contract called for the construction of approximately 24.2 miles of new electric transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two appurtenant substations and a breaker station.

The accident in this case happened at one of the substations, known as Walhalla, when the lineman came in contact with a live wire on a line which the contractor was converting from a one-phase or one-wire line to a two-phase or two-wire line. It served the residents of a rural section known as the Ebenezer Community and was connected at a right angle with a transmission line on a highway at a point about 1,250 feet from the Walhalla station.

The conversion required the relocation of a portion of the Ebenezer line where it left the highway, and the running of a new line from the new connecting point to the substation; and meanwhile it was necessary to do the work

in such a manner as to continue the service to the Ebenezer Community as far as it was possible to do so. The construction contract expressly provided in this respect that at the beginning of each day the contractor would notify the owner of the lines to be de-energized and at the end of each day the contractor would notify the owner of the lines to be re-energized, and that in each instance the owner would take the necessary steps to comply with the notice.

On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days. The wires running from it to the new connecting point on the Ebenezer line were also in place and one of them received current from another source and was used to service the community. It was brought from the connecting point to a double-end pole located within the fenced area of the substation at a distance of seventy-five feet, and ran thence to the substation itself. It was intended that the current should not run to the substation but should be cut off at the pole by postponing the installation of a connecting device thereon, known as a jumper, until the substation was completed. Unfortunately, through a mistake of a foreman of the contractor, a permanent closed jumper was placed on the pole and a foreman of the owner was notified that it was safe to energize the line, and he did so without inspecting the line himself. An examination would have shown that the current would run through to the substation. In this situation another foreman of the contractor, who also failed to inspect the line, took the plaintiff lineman to the substation and directed him to make a connection between the line outside and the equipment inside the substation,—and the lineman in attempting to do so caught hold of the live wire, believing it to be dead, and was burned.

That the accident was caused primarily by the negligence of employees of the Bouligny company, which is not a party to the instant suit, was abundantly proved and is not in dispute, and on this account Blue Ridge, the defendant company, contends that it should be exonerated. It has been noted above, however, that the construction contract imposed upon Blue Ridge alone, the duty of put-

ting on and cutting off the current during the course of the work when notified by the contractor; and there was additional evidence offered by a qualified electrical engineer that standard safety procedure in electrical work requires that a person who is responsible for letting power into existing lines to which new lines are connected, must personally inspect the connection before energizing the old lines. Because of this evidence, the issue of negligence on the part of Blue Ridge was submitted to the jury.

Blue Ridge also defended on the ground that recovery was precluded by contributory negligence on the part of the lineman who could have readily seen the permanent bond on the double-end pole only seventy-five feet away, if he had taken the pains to trace the wire from the substation to the pole. The evidence, however, showed not only that he was acting under the orders of his superior when he was hurt, but that he relied on the standard safety regulation that a new construction built by a contractor must not be energized until it has been inspected, approved and turned over to the owner. Accordingly, the issue of contributory negligence was also submitted to the jury.

We do not question the submission of the issue of contributory negligence to the jury under these circumstances. The sufficiency of the evidence to show negligence on the part of the Cooperative is, however, not free from doubt, but it is not necessary to decide this point in view of the basic defense that the lineman's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina, Title 72 of the South Carolina Code of 1952. That statute provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the execution of the whole or any part thereof, the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him. §72-111.

When a contractor agrees to do work for another person which is not a part of the trade or business of the other person and contracts with a subcontractor to do the whole

or part of the work, the contractor becomes liable to pay compensation to the workmen of the subcontractor. §72-112. A like provision for the protection of the workmen of a subcontractor is made in §72-113. When a principal contractor [2] is liable to pay compensation under these sections, he is entitled to indemnity from any person who would have been liable to pay compensation independently of the sections. §72-115. A workman may recover compensation from the subcontractor instead of from the principal contractor, but not from both. §72-116. Every employer who accepts the compensation provisions of the Act is required to secure the payment thereof by insurance or otherwise. §§72-401 *et seq.*

The rights and remedies granted by the statute to an employee exclude all other rights and remedies of the employee as against his employer at common law or otherwise, on account of injury, §72-121; and the acceptance of an award under the statute or the procurement and collection of a judgment in an action at law is a bar to proceeding further with the alternate remedy. §72-123.

It was conceded in the Court below that both Blue Ridge, the owner, and Bouligny, the contractor had complied with and were operating under the Compensation Act, and that after the injury the lineman had elected to receive and had accepted full benefits thereunder from Bouligny; and it was also conceded that if the work being done at the time of the injury constituted a part of the business of the cooperative, the present suit must fail. The burden of the appellee's argument rests on the assertion that the construction work done by Blue Ridge itself was limited to everyday operations of hooking up connections for customers and did not include extensive line construction, and in view of the fact that the lineman was hurt while attempting to connect the substation with the new line, it is contended with especial emphasis that the construction of the substation was not part of the business of the Cooperative.

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[2] It was said in *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 362 that the term "principal subcontractor" is synonymous with owner.

The uncontradicted evidence as to the construction work done by the employees of Blue Ridge may be summarized as follows: It maintains an outside crew of 8 linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It constantly builds new lines to new consumer members and builds extensions, some short and some long, up to eight miles in length; but since the end of World War II so many persons in rural areas have demanded electrical service that it has employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. All of the construction work, whether done by itself or by outside contractors, is done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which is employed by Blue Ridge to make sure that the system complies with the requirements of the Rural Electrification Administration of the United States.

The testimony with respect to the construction of the substations of Blue Ridge, stated most favorably to the appellee, discloses that originally Blue Ridge built three substations with its own facilities, but that all of the substations which were built after the war, including the six it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident it had no one in its direct employ capable of handling the technical detail of substation construction.

There can be no doubt that all of the work covered by the Bouligny contract was of the class which Blue Ridge was empowered by its charter to perform and that all of it was necessary to enable it to serve the growing needs of the rural communities. Furthermore, the main actor in the whole enterprise was the Cooperative itself. This is seen the more clearly when we round out, by way of illustration, the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Blue Ridge secured a loan of $334,300.00 from the United States under the Rural Electrification Act of 1934, as amended, to finance the construction work above

described, the lines to be located along such routes as the owner with the approval of the Administrator should designate. Blue Ridge then entered into an engineering service contract with the Southern Engineering Company, whereby the Engineer agreed to render the engineering services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the Engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the Engineer after the procuring of rights of way and easements by the owner, and the supervision by the Eng er of all the details of the construction work as the representative of the owner.

The construction contract with Bouligny conformed to the requirements of the loan agreement. It defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the substations were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work.

From this description there can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and substations necessary for the distribution of the product, if these words are given their ordinary significance. The appellee says, however, that in the meaning of the compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employ-

Moreover, this Court in reaching the conclusion that Byrd's work was part of the business of the defendant, also must have overlooked the evidence of record wherein Mr. Hurt, defendant's manager, disclaimed all responsibility for making an investigation, which would have been defendant's responsibility if Byrd's work were part of defendant's business rendering it liable under the Workmen's Compensation Act, because Mr. Byrd was not "one of our men" and "the station was not ours," as appears from the following evidence of record:

WITNESS A. J. HURT

(Pages 42, 43 of Appellee's Appendix.)

"Q. Was any investigation made?

A. I don't know, sir. Not for the Blue Ridge Co-op because Mr. Byrd was not our man, sir.

Q. And you felt that you were only responsible for your men that were hurt?

A. That was all I was responsible for and the station was not ours, sir."

* * *

"Q. Did you inquire from him as to what he knew about this accident?

A. No, sir, because, as I say, it was no concern of mine because of the fact that it was not one of our men, sir."

* * *

Notwithstanding the foregoing references to the record, if the testimony of Mr. Hurt on the material issue of whether defendant Blue Ridge built with its own facilities and employees three substations can be construed to mean that defendant had built substations with its own facilities and employees, petitioner assures this Court that, on the basis of his information and belief, he would, if afforded an opportunity, produce testimony and evidence far different from such construction of Mr. Hurt's testimony, and states his *bona fide* belief that he can show, at the least, a genuine dispute over this material fact.

ees; and reliance is placed on the evidence that since the war Blue Ridge has sublet the construction of substations to outside contractors, and the line work performed by its own employees has been limited in extent. We do not think this interpretation of the statute is tenable. It will be noticed in the first place that §72-111 makes specific provision for the performance by a contractor of work which is part of the owner's business and in such case imposes upon the owner the same liability to pay compensation to the contractor's workmen as if they were immediately employed by him. In other words, the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In consequence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection.

The decisions of the Supreme Court of South Carolina are in accord with these views. Very similar was the case of *Marchbanks v. Duke Power Co.*, 190 S. C. 336, where the power company, like Blue Ridge, was in the business of distributing electricity which from time to time required the erection of poles and transmission lines. In carrying out this purpose, it contracted with an outsider to paint 170 metal poles, and one of his workmen was injured while doing the work and sued the power company in an action of tort. It was held that the suit could not be maintained, and that the worker's only remedy was under the Compensation Statute which relieved the power company of common Law Liability. Circuit Judge Oxner, now a Justice of the Supreme Court of the State, whose opinion was set out in full and approved by that Court, described the purpose of the Act in these words, 190 S. C. 343, 344:

> "It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was a

FOURTH

The decision of this Court was also based upon its conclusion that the South Carolina case of *Miles v. West Virginia Pulp and Paper Company,* 212 S. C. 424, 48 S. E. (2d) 26 was not applicable. In reaching this conclusion, it is respectfully submitted that this Court overlooked the principle announced by the Supreme Court of South Carolina that an employee of an independent contractor cannot be deemed to be in the performance of the trade, business or occupation of the person (owner) engaging the independent contractor where there is **no ownership** by such person of the subject matter of the work. And it is clear from defendant's answers and its answers to the interrogatories contained on pages 79 through 81 of Appellee's Appendix that the defendant, at the time plaintiff lost both arms by reason of touching the live wire, had not accepted and did not own, possess nor control the substation and lines on which plaintiff was working. That the defendant did not own the substation at the time of plaintiff's injuries is also apparent from a reading of the decision of this Court in the instant case wherein in discussing the question of liability it is stated that "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days."

The decision of this Court was also based upon its conclusion that *Glidden Rural Electric Cooperative v. Iowa Employment Security Commission,* 236 Iowa 910, 20 N. W. (2d) 435, was not applicable. In reaching this conclusion the Court overlooked the principle contained in the cited case that construction work performed by an independent contractor for a Rural Electric Cooperative is not part of the trade, business or occupation of a Rural Electric Cooperative. Obviously the cited case was controlling on the facts herein wherein it appeared that plaintiff was injured as an employee of an independent contractor performing construction work.

The decision of this Court was also based upon its conclusion that the South Carolina cases of *Marchbanks v. Duke Power Company,* 190 S. C. 336, and *Boseman v. Pa-*

part of his trade or business by permitting such owner to sublet or subcontract some part of said work. Doubtless in many instances such contractors would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such contractors would not be required under the Act to carry compensation insurance. It was therefore, provided under the first paragraph that where such work in which the employee was engaged was part of the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not."

A like result was reached in *Boseman v. Pacific Mills*, 193 S. C. 479, where, in the execution of a contract between the owner of the mill and an independent contractor for the painting of a water tank maintained by the mill for fire protection, an employee of the contractor was killed by the unexplained explosion of the tank. A claim against the mill for Workmen's Compensation was resisted on the ground that the workman was not an employee of the mill and that the painting of the tank was not part of its trade or business, because the work was of such dangerous and unusual character that it was never done by the regular employees of the mill but was always let out by contract to an experienced steeplejack. In overruling this contention, the Court said (p. 483):

"The testimony was to the effect that the mill furnished all the paint, the ladders and any lumber or scaffolding necessary to do the work. As already seen, the contract itself contained a postscript that 'the above work is all subject to inspection and approval by representatives of Pacific Mills.' The tank was an integral part of the mill business. There was also testimony to the effect that the mill desired that the work on the inside of the tank be completed as soon as possible so that its everyday, ordinary service, that of fire protection, could be resumed, it being shown that the mill depended upon this tank for such protection. The very nature of the work done by the mill, that of the

manufacture of cotton into cloth, especially required the best of protection against fire. Hence this tank was particularly necessary and essential in the operation and carrying on of the business of the mill. It, therefore, follows that the painting of the tank was such a part of the trade, business or occupation of the Pacific Mills as would constitute Martin a subcontractor, and thus render the mill liable to the beneficiary of Boseman for payment of compensation." [3]

The appellee seeks to distinguish some of these cases on the ground that in them the injured man was engaged in maintenance work ordinarily performed by the employees of the owner in the operation of the business; but it is manifest that it would defeat the purpose of the Act to make the prime mover of an enterprise liable to pay compensation for injuries suffered in the work of maintenance or repair, whether he is negligent or not, but to exempt him in the more important and more extensive field of new construction. For the same reason, it cannot be held that an owner is not obliged to provide compensation for injuries incurred in the course of construction work performed on his behalf as part of his business, if he customarily lets the work out to independent contractors and does not perform it himself. It will have been noticed that §72-111 of the Act expressly covers an owner who undertakes to perform any work which is part of his business and contracts with any other person for the execution "*of the whole or any part of the work*". Thus, the statute recognizes that work done at the behest of the owner is owner's work; and unless he is held liable to pay compensation for injuries incurred in its progress the underlying purpose of the Act will be frustrated. The quotation from

[3] For other South Carolina cases in which the owner was found liable for compensation to injured employees of subcontractors, see *Kennerly v. Ocmulgee Lumber Co.*, 206 S. C. 481, where the owner of a sawmill let a contract for cutting timber on its own lands under its supervision; *Hopkins v. Darlington Veneer Co.*, 208 S. C. 307, where the owner of the plant subcontracted the cutting of timber on its lands; *Smith v. Fulmer*, 198 S. C. 91, where a bridge builder sublet the making of fills and the laying of pavement to a subcontractor. See also the decisions of this Court in *Doane v. E. I. du Pont de Nemours & Co.*, 209 F. (2d) 921; *Berry v. Atlantic Greyhound Lines*, 114 F. (2d) 255.

Boseman v. Pacific Mills set out above is particularly pertinent in this connection, as are also the decisions in *Purkable v. Greenland Oil Co.*, 122 Kan. 720 and *Wisinger v. White Oil Co.*, 5 Cir., 24 F. (2d) 101, cited with approval in *Marchbanks v. Duke Power Co., supra.* As was said in that case, 190 S. C. 363:

> "It is the clear purpose of the Act to make the owner, the person interested in having the work done, liable to the employee so injured".

It cannot be denied that Blue Ridge was vitally concerned in the construction of the equipment covered by the Bouligny contract, without which the distribution of its product would have been impossible.

The cases on which the appellee relies are distinguishable on the ground that the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged. Thus, in *Miles v. W. Va. Pulp and Paper Co.*, 212 S. C. 424, the owner of a pulpwood plant engaged a contractor to supply him with pulpwood on a commission basis; in *Benbow v. Edmunds High School*, 220 S. C. 363, the school authorities employed an electrical contractor to repair a lighting fixture in a high school; in *Horrell v. Gulf & Valley Oil Co.*, 15 La. App. 603, a contractor was employed to install a furnace in an oil refinery; in *Packett v. Moretown Creamery Co.*, 91 Vt. 97, a contractor was employed to erect a building for a creamery; and in our decision in *Sears, Roebuck & Co.*, 172 F. (2d) 802, a corporation engaged in the sale of goods contracted with a builder to make certain alterations in a storage warehouse. In *Glidden Rural Elec. Cooperative v. Iowa Employment Security Commission*, 236 Iowa 910, the cooperative was successful in resisting an assessment for unemployment compensation tax on the grounds that it had never had as many as 8 employees and, although it had let contracts for the construction of lines, it had never engaged in the construction work except to make service connections, and hence the Court held that the work done by the contractor was not a part of the *usual* trade or business of the cooperative within the terms of the statute.

We conclude that the work performed by Bouligny under the contract was done in carrying on the trade or business of the Cooperative.

In the District Court the plaintiff conceded that he had no case if the work in which he was engaged when he was injured was part of the trade or business of Blue Ridge. He now contends, however, in the alternative, that even if the work was of this character he is not precluded from bringing the present action because Bouligny paid the compensation award and hence the acceptance of the award does not bar his suit under the provisions of §72-123 of the statute. Although the point is now raised for the first time we, nevertheless, consider it since it goes to the heart of the defense and the parties have discussed it in the briefs on this appeal.

The contention in our opinion cannot be sustained. It involves the erroneous assumption that although the statute imposes an absolute liability upon the owner of the business to provide compensation, usually effected by carrying insurance for the employees of the independent contractor, the owner loses the offsetting benefit of immunity from suit at law provided by the statute, if the injured workman elects to receive compensation from the contractor. It is generally held under statutes of this kind that both the owner of the business and his independent contractor, or the principal contractor and his subcontractor where they are the parties concerned are exempt from suit. A leading case on the subject is *State v. Bennett Bldg. Co.*, 154 Md. 159, where the building company was sued in an action at law for the death of an employee of a subcontractor who had undertaken to lay tile floors in a building under construction. Prior to the institution of the suit an award of compensation under the Maryland compensation statute had been paid by the sub-contractor. The Maryland statute like that of South Carolina provides that where a principal contractor undertakes under contract the execution of any work in the way of his trade or business and contracts with any other party as subcontractor for the execution of the whole or any part of the work, the principal contractor shall be liable to pay any workmen

employed in the execution of the work any compensation under the Act which he would have been liable to pay if the workmen had been immediately employed by him. In considering the effect of the statute and sustaining the defense that the principal contractor was exempt from suit at law the Court said (154 Md. 162-163, 165, 167-168):

> • • • "The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor, when he was not in law the employer of the injured workman. The result then is that where the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work. This absolute statutory liability is not affected by the fact that it is later provided, in section 62, that the workman may elect whether he shall enforce the compensation against the principal contractor or the subcontractor; or that, whenever an employee proceeds against the principal contractor, the latter shall have the right to join the subcontractor or any intermediate contractor as defendant or codefendant in the case; or that, when the principal contractor is liable to pay compensation pursuant to this section, he shall be entitled to indemnity from any employer who would have been liable to pay compensation to the employee independently or section 62. These provisions leave unimpaired the primary liability imposed by the statute upon the principal contractor. The first gives to the workman the choice of two primary liabilities, as but one is enforceable by him. The second is a matter of procedure, and the third relates to the question of indemnity to the principal contractor by the subcontractor, and neither concerns the liability of the principal contractor to the workman. This primary liability, so imposed by statute upon the principal contractor, is not based upon contract, since the legislation is predicated upon the fact that no contractual relation, as master and servant, exists between the principal contractor and the workman; nor does it flow from a breach of

duty, because the liability arises independently of the existence of fault on the part of the principal contractor. This legislation, however, finds its constitutional support in the consideration that the general welfare is promoted and conserved by requiring the employer and the workman to yield something of their respective rights toward the establishment of a principle and plan of compensation for their mutual protection and advantage."

* * * "It may be said that there were two employers of the dead man. One was his immediate employer, the subcontractor, whose relation was founded in contract; and the second was his more remote statutory employer, the principal contractor, whose status, with the rights and liabilities growing thereout, was created and determined by law."

* * * "If the construction by the appellant prevail, the dependent may recover compensation of the subcontractor, and also damages at common law against the negligent principal contractor, who is thus taken out of the act, by the dependent's choosing to file her claim against the subcontractor, but who would remain within the act, if she should file her claim for compensation against the principal contractor. In short, the liability of the principal contractor would not be fixed and determined by law, but by the arbitrary exercise of the dependent's will. The result of this contention would be to impose upon the general contractor an onerous and dual liability for compensation or damages, at the election of the employees of a subcontractor, while limiting his liability to his own immediate workmen to compensation alone. This theory would deprive a class of employers within the act of their exemption from all liability save that of compensation, which is an essential part of the general legislative plan. A construction so antagonistic to the fundamental principles underlying the enactment will not be adopted. If an employer is within the act to bear its liabilities, he must remain to be accorded its immun-

ities, in the absence of a clearly expressed legislative intention to the contrary."

The importance of this case for our purposes is seen by the approval given the decision in *Marchbanks v. Duke Power Co.* where, as in the pending case, the plaintiff claimed not only that the work being done was not part of the defendant's business but also that the remedy afforded by the Compensation Act was not exclusive. The Court said: (190 S. C. 351-352)

> "I now come to plaintiff's third and last contention to the effect that his remedy under the Compensation Act is not exclusive. Most of the cases cited as sustaining this contention involve acts which are materially different from that in force in this State in that no direct liability is imposed upon the principal or owner. These acts require such owner or principal to see that the contractor carries compensation insurance for the protection of his employees and only in instances where he fails to do this does liability on his part arise.
>
> "The best reasoned case that I have found on this question is that of *State v. Benjamin F. Bennett Bldg. Co.*, 154 Md., 159, 140 A., 52, 53. It involves an act similar in principle to that of this State."

The Court then quoted extensively from the decision of the Maryland Court.

In opposition, the appellee calls attention to the unreported decision of the District Court of the United States for the Eastern District of South Carolina in *Ballard Admx. v. Southern Oil Co.* and the decision in *Youginer v. J. A. Jones Const. Co.*, 215 S. C. 135. In the *Ballard case* it was held that an action at law would lie against the owner of a building for the death of a workman who was killed while working on the wall of a building for the owner as an employee of an independent contractor, although his estate had recovered compensation from his immediate employer. The decision was based on the theory that §72-111 of the South Carolina Compensation Act imposes liability on an owner to provide compensation only when the con-

tractor fails to provide coverage. We find it impossible to follow this decision since it seems to us to be in direct conflict with the decision of the Supreme Court of South Carolina in *Marchbanks v. Duke Power Co.* and the cases cited therein.

The decision in *Younginer v. J. A. Jones Const. Co.* is relied upon because the Court in its opinion described the liability imposed upon the principal contractor by §72-111 as secondary in nature; and this is taken by the appellee to mean that the principal contractor is only a guarantor and his liability to provide compensation arises only when the subcontractor fails to do so. We do not think that this interpretation of the language can be sustained. A claim for compensation was filed in the cited case by an injured man against his immediate employer under the South Carolina Act for an injury incurred in doing work outside the State; and it was necessary for the claimant to show that the contract of employment was made inside the State. For this purpose he relied on a previous contract of employment in the State between him and a subcontractor of the respondent which had been completely performed. The Court pointed out that the work in South Carolina and the claimant's employment therein had been completed long before the injury outside the State occurred, and also said that the liability of the principal contractor under the terms of the statute is secondary in nature, obviously meaning that the liability of a principal contractor to the employee of a subtractor rests upon the existence of an employment contract between the subcontractor and his direct employees. The use of the term "secondary" in this context was not inconsistent with the existence of an absolute liability on the part of the principal contractor under the statute. It was pointed out in a note on the subject in 151 A. L. R. 1364, 1367 that in some jurisdictions the Compensation Acts instead of making the liability of the general employer dependent on the carrying of insurance by the independent contractor, directly impose what amounts to "an absolute although perhaps secondary liability" on the former for injury to employees of the latter. It was obviously in this sense that the phrase under consideration was used in

the *Younginer case*. The opinion was written by Mr. Justice Oxner, who cited his former opinion in the *Marchbanks case*, and it is inconceivable that he intended to overrule that decision without expressly saying so.

For other decisions interpreting the varying terms of State Workmen's Compensation Acts see also 58 A. L. R. 894; 166 A. L. R. 813.

The motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion of the defendant for judgment in its favor *non obstante veredicto* should have been granted. The judgment of the District Court will therefore be reversed with direction to enter judgment for the defendant.

Reversed.

PETITION FOR REHEARING

The petitioner prays that this Court grant a rehearing of its decision of October 1, 1956, reversing the judgment of the District Court and remanding the cause, with **direction to enter judgment for the defendant,** upon the following grounds:

FIRST

The decision of this Court, remanding the cause with direction to enter judgment for the defendant instead of grant a new trial, was obviously based upon its conclusion that, on the issue of defendant's affirmative defense of the South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action, "the uncontradicted evidence" shows that the defendant "Blue Ridge has engaged • • • in the **construction** and maintenance of distribution lines, transmission lines and **substations**", and upon the fact that no reply evidence in contradiction to that of the defendant on this issue was introduced by plaintiff in the trial of the case. In directing the entry of judgment for the defendant, this Court apparently overlooked that the reason plaintiff did not introduce any testimony in contradiction of that of the defendant on this issue was because of the ruling of the Trial Judge dismissing this affirmative defense and

withdrawing such issue from the jury before plaintiff's case in reply. Consequently, the direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of his constitutional right to a jury trial on a factual issue. Therefore, this Court must have overlooked that the judgment of this Court is not an appropriate one which is just under the circumstances, as appears from the following contained in the transcript of record:

(Pages 352-353 of Reporter's Transcript.)

"Mr. WALKER: The defendant rests, your Honor.

The COURT: Anything in reply?

Mr. EDENS: We have a motion, your Honor.

The COURT: Gentlemen, go to your jury room.

(Jury retires.)

Mr. HAMMER: If the Court please, at this time we move to strike the affirmative defense interposed by the defendant with respect to those allegations that the plaintiff is excluded or precluded from bringing this action by reason of the fact that he was engaged in work which was part of the trade, business or occupation of the defendant within the meaning of the Workmen's Compensation Act, for the reason that it has been conclusively demonstrated that the defendant is not engaged in the business of constructing substations, * * *."

(Page 355 of Reporter's Transcript.)

"Mr. HAMMER: We are moving at this time in the nature of an involuntary dismissal.

The COURT: You move to dismiss the defense?

Mr. HAMMER: Yes, sir, at this stage of the game."

(Page 359 of Reporter's Transcript.)

"The COURT: * * * I will have to grant the motion. I allow you an exception. Bring in the jury.

(12:55 P. M., Jury returns to open Court.)

The COURT: Anything in reply?
Mr. EDENS: Nothing, your Honor."

SECOND

In reaching the conclusion that the plaintiff while working on the construction of the substation as part of the construction project was engaged in the trade, business or occupation of the defendant, this Court must have overlooked that there was no evidence that defendant ever engaged in the business of constructing a single project of the magnitude of the project on which plaintiff was injured, which project involved under the construction contract between the defendant and the independent contractor the construction of 24.2 miles of new transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two substations and a breaker station at a cost of $334,300.00. The construction work of a project of this magnitude is clearly the business, trade and occupation of an electrical contracting construction firm and not the trade, business and occupation of the defendant whose business is to supply and distribute electric power to its customers, within the meaning of the words "trade, business or occupation" used in their ordinary sense, as was so aptly stated by the District Judge on page 356 of the Reporter's Transcript, as follows:

> "The COURT: What bothers me about your defense is: what is the business of these people? The business of these people is selling electricity. They are not contractors to build substations."

THIRD

The conclusion of this Court that the defendant Blue Ridge constructed with its own facilities and employees three substations and was therefore engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action obviously was based upon the testimony of defendant's witness A. J. Hurt, manager of defendant company, who was the only

witness that testified concerning the construction of substations.

In reaching this conclusion on the basis of Mr. Hurt's testimony, this Court apparently viewed his testimony out of context, and not as a whole, and overlooked that he finally admitted that the defendant company did not construct with its own facilities any substations, or, at least, that his testimony contained self-contradictions and was evasive, consequently being susceptible to incredibility, and thus at best making the question of whether defendant constructed with its own facilities substations an issue to be passed upon by a jury, as appears from the evidence of record which shows that Mr. Hurt, although he first testified on direct and cross examination that the defendant company built with its own facilities and employees three substations, the last of which was built three years before trial at Liberty, South Carolina, on being recalled to the stand the following day for further cross examination, he changed his testimony and admitted that the substation at Liberty built three years before the trial was not constructed by defendant with its own facilities, but by Sumter Builders, an independent contractor engaged in the construction business; and he then finally admitted that none of defendant's substations was built by defendant with its own facilities, as appears from the following evidence of record.

DIRECT EXAMINATION OF A. J. HURT, MANAGER OF DEFENDANT COMPANY

(Page 134 of Appellant's Appendix.)

"Q. Does the Cooperative construct substations with its own employees?

A. Yes, sir, we have constructed sub-station.

Q. Has any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case?

A. Yes, sir, we have built sub-stations of that nature.

Q. Do you recall how many sub-stations the Co-operative has built with its own employees?

A. Yes, sir, we built three."

CROSS EXAMINATION OF A. J. HURT

(Pages 51-52 of Appellee's Appendix.)

"Q. How many sub-stations do you have?

A. We have six, sir.

• • •

Q. How long prior to the construction of this sub-station that Mr. Byrd got his arms burnt off on had it been since a substation had been constructed in behalf of the Blue Ridge **or by them?**

A. Approximately three years.

Q. Where was that one?

A. **That's at Liberty.**

Q. At Liberty?

A. Yes, sir, South Carolina.

Q. Who built that?

A. **We did, sir.**

Q. **Three years before?**

A. **Yes, sir."**

A. J. HURT RECALLED FOR CROSS EXAMINATION

(the following day)

(Pages 72-74 of Appellee's Appendix.)

"Q. Did I understand you—I mean, I understood yesterday that you testified you had six substations in the Blue Ridge set-up?

A. I think I said five or six, sir, yes, sir.

Q. Is that correct?

A. Yes.

Q. Is it five or six?

A. I would say six, sir.

Q. Will you tell me where they are?

A. They are at Liberty.

• • •

Q. You didn't build the one at Liberty, did you?

A. The station there . . .

Q. Three years ago, you didn't build that substation yourself?

A. No, sir, I didn't intend to give that impression, sir.

* * *

Q. And the substation at Liberty was built by whom?

A. The one there now, sir, I don't know who built it off-hand, sir.

Q. You don't know who built your substation at Liberty?

A. Not right now, I do not, sir.

Q. Would it refresh your recollection to name Sumter Builders? Do you recall now that they built that substation?

A. Since you mentioned it. They did some work for us, sir.

Q. I didn't ask you that. I said, **didn't they build your substation at Liberty?** You don't know whether they did or not?

A. I would say they did, yes, sir.

* * *

Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir."

The Court, in concluding that the uncontradicted evidence and only inference to be drawn from Mr. Hurt's testimony was that defendant had constructed with its own facilities and employees three substations also must have overlooked the evidence of record in the light of the colloquy between the District Judge and counsel for defendant, wherein the Judge during defendant counsel's argument in opposition to the motion to dismiss, stated that he (the Judge) understood that the witness Hurt had changed his testimony given the day previous that defendant built three substations with its own employees, as appears from the following contained in the Reporter's Transcript:

(Page 356 of Reporter's Transcript.)

"The COURT: After Mr.—the gentleman—corrected his testimony, how many substations have they built?

Mr. WALKER: They have built three, your Honor.

The COURT: **I understood he changed his testimony, that they had not built three**".

And finally, although defendant's counsel contended that Blue Ridge built with its own facilities and employees three of the six substations, the evidence of record conclusively shows that none of the six substations operated by Blue Ridge were built by Blue Ridge with its own facilities or employees, as appears from the following evidence of record:

(Page 358 of Reporter's Transcript.)

"The COURT: If they were engaged in that business, why did they go to Charlotte and hire this contractor? If they were engaged in that business, they would have done it themselves. Instead of that, they go to Charlotte and get a contractor not only to build this substation but to build others in the past.

Mr. WALKER: He testified they did it to expedite the work. Insofar as expediting the business.

The COURT: **According to your own testimony, you say they only built three and that is half of them. They owned six or seven?**

Mr. WALKER: **They have six, yes, sir.**

The COURT: According to you they built half of their substations.

Mr. WALKER: I believe one of those three has been subsequently replaced, but still they are in the business."

• • •

A. J. HURT RECALLED FOR CROSS EXAMINATION

(Page 75 of Appellee's Appendix.)

"Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir.

Q. Thank you very much."

cific Mills, 193 S. C. 439, were controlling on the facts herein. In reaching this conclusion the Court must have overlooked that each of those decisions was confined to facts where the work being performed was on a facility owned by the "owner", a necessary prerequisite to make an "owner" liable under the Workmen's Compensation Act, *Miles v. West Virginia Pulp and Paper Company, supra;* and, clearly, the defendant did not own the facility on which plaintiff was working when injured. Evidently, this Court also overlooked that those decisions were confined to factual situations where each of the injured employees was performing **maintenance work** on a facility owned by the "owner", as distinguished from the work of **constructing a new facility** not yet "turned over to the owner", which was the work being performed by plaintiff at the time he was injured and lost both of his arms. Moreover, the decision of this Court in the instant case is in direct conflict and irreconcilable with the decision of this Court in *Sears, Roebuck and Company v. Wallace,* 172 Fed. (2d) 802, wherein the Court held that extensive alteration work performed by an independent contractor for another person (owner) is not part of the trade, business or occupation of such other person (owner).

The decision of this Court was predicated upon its conclusion that the cases of *Miles v. West Virginia Pulp and Paper Co.,* 212 S. C. 424, 48 S. E. (2d) 46; *Benbow v. Edmunds High School,* 220 S. C. 363, 67 S. E. (2d) 680; *Horrell v. Gulf & Valley Oil Co.,* 15 La. App. 603, 103 So. 709; *Packett v. Moretown Creamery Co.,* 91 Vt. 97, 99 A. 638, and *Wallace v. Sears Roebuck & Co.,* 4 Cir., 172 F. (2d) 802, were not applicable herein under its reasoning that in each of the cited cases the work performed by the employee of the independent contractor was not part of the **owner's** business because "the work done, **although useful** to the business, was performed in carrying on a trade or occupation **in which the owner of the business** was not engaged". In reaching this conclusion this Court must have overlooked that the facts in the cited cases are on "all fours" with those in the instant case, for here the construction work of large projects, including the construction of the

substations, performed herein, although useful to the defendant "owner's" business of supplying and distributing electricity to its customers, is a trade or occupation in which the **defendant is not engaged.** In the case at bar the only one engaged in the trade or occupation of an electrical construction contractor involving the work performed herein was Bouligny Construction Company—a trade or occupation in which the defendant Blue Ridge was clearly not engaged.

For the reasons set forth above and in the Brief filed by appellee, it is respectfully urged that a rehearing be granted, and that upon such rehearing the judgment of the District Court be affirmed, or in the alternative, the cause be remanded with directions to the District Court to grant a new trial.

Respectfully submitted,

HENRY H. EDENS,
HENRY HAMMER,
WILLIAM E. CHANDLER, JR.,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,
HENRY HAMMER,
WILLIAM E. CHANDLER, JR.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7183

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., APPELLANT,

versus

JAMES EARL BYRD, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT ANDERSON

This Court having at its October term, 1956, rendered its decision reversing the judgment of the said District Court appealed from in this cause, and the appellee having on October 31, 1956, filed a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.
November 15, 1956.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

A true copy,

Teste:

RICHARD M. F. WILLIAMS, JR.,
Clerk, U. S. Court of Appeals for
the Fourth Circuit.